128-26

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~96.~~ 10

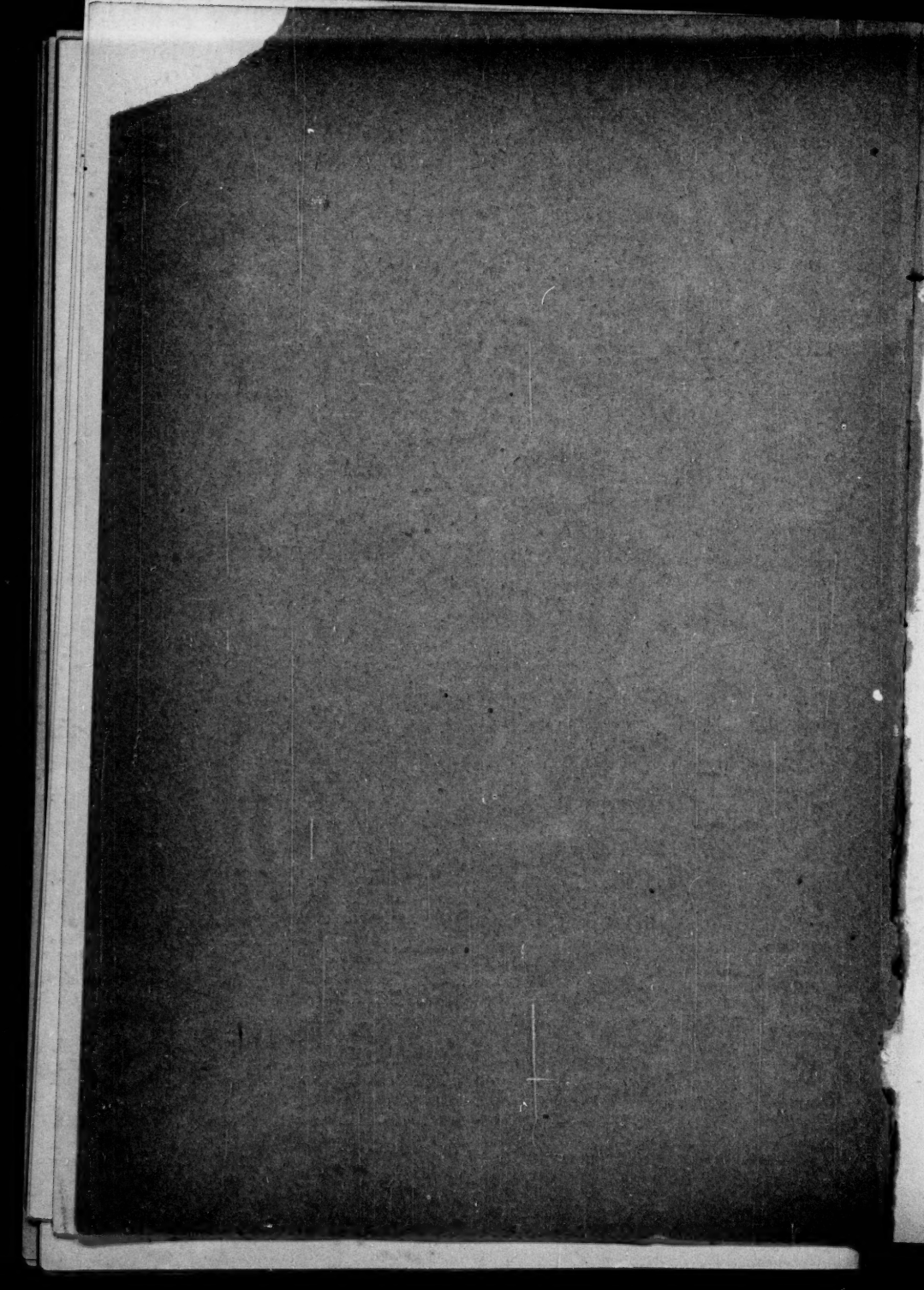
THE LEATHER MANUFACTURERS' NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1884.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the Merchants' National Bank of the city of New York and the Leather Manufacturers' National Bank, a manifest error hath happened to the great damage of the said Leather Manufacturers' National Bank, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-second day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed:

W. J. WALLACE.

2 [Endorsed:] U. S. Supreme Court. The Leather Manufacturers' National Bank, plaintiff in error, *vs.* The Merchants' National Bank of the city of New York, defendant in error. Writ of error. Jno. E. Parsons, att'y pl'ff in error, 111 Broadway, New York city. Service of a copy of within is hereby admitted this 23d day of Sept., 1884. Burrill, Zabriskie & Burrill, att'ys def'ts in error.

[Stamped:] U. S. circuit court. Filed Oct. 1, 1884. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-six, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of the Leather Manufacturers' National Bank, plaintiff in error, against the Merchants' National Bank of the city of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U S. Circuit Court, Southern Dist., New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 *Summons with Notice.*

Supreme Court, City and County of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,

against

THE LEATHER MANUFACTURERS' NATIONAL BANK, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated, December —, 1877.

BURRILL, DAVISON & BURRILL,
Plaintiff's Attorneys.

P. O. address: New York city, No. 68 William street.

Notice.

Take notice that upon your default to appear or answer the above summons judgment will be taken against you for the sum of
4 seventeen thousand five hundred dollars, with interest from January 1st, 1872, and with costs of this action.

BURRILL, DAVISON & BURRILL,
Plaintiff's Attorneys.

(Endorsed): Supreme court, city and county of New York. The Merchants' National Bank of the city of New York, plaintiff, against The Leather Manufacturers' National Bank, defendant. Summons with notice. Burrill, Davison & Burrill, plaintiff's attorneys.

5 Supreme Court, City and County of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK

against

THE LEATHER MANUFACTURERS' NATIONAL BANK.

The plaintiff above named, by Burrill, Zabriskie & Burrill, its attorneys, complains of the defendant above named and alleges, on information and belief—

That at the several times hereinafter mentioned the plaintiff and the defendant were, and still are, banking corporations created and organized under and by virtue of the laws of the United States, and located and carrying on the business of banking in the city of New York.

That on or about the 9th day of March, 1870, the Bank of British North America, then a depositor with the plaintiff, and having the amount thereof to its credit with this plaintiff, drew and delivered its check on this plaintiff for seventeen thousand and five hundred dollars, dated March 9th, 1870, and thereby directed this plaintiff to pay said sum to the order of Margaret G. Halpine, and said check was subsequently delivered to and came into the possession
6 of the defendant, which held the said check on the 10th day of March, 1870.

That on the said 10th day of March, 1870, the said defendant, then being the holder of said check, caused the same to be presented to this plaintiff for payment and payment thereof to be demanded, and thereupon, in pursuance of such demand so made, this plaintiff paid to the said defendant the amount of the said check, and the defendant then and there received the amount thereof, to wit, seventeen thousand five hundred dollars, and said check was delivered to this plaintiff, and the said Bank of British North America was by this plaintiff charged with the amount thereof in its account with this plaintiff, and said check was returned to said Bank of British North America as a voucher for said payment, and said Bank of British North America allowed the said charge and did not object thereto or elect to cancel or rescind the credit given to this plaintiff in said account until the time hereinafter mentioned.

That when so presented by and paid to said defendant said check bore an endorsement purporting to be the endorsement of the payee of the said check, and also bore other endorsements in blank.

That when the said check was so presented by said defendant for payment and paid by this plaintiff, as aforesaid, the defendant believed that such endorsement on said check, purporting to be that of the payee thereof, was the genuine endorsement of such payee, and that this plaintiff was authorized to pay to the defendant and
7 that the defendant was entitled to receive from this plaintiff the amount of said check, and this plaintiff also so believed, and in the belief and on the faith thereof, and in the belief that such endorsement was that of the said payee, this plaintiff, on said 10th day of March, 1870, paid to said defendant, and the latter re-

ceived from this plaintiff in payment of said check, the said sum of seventeen thousand five hundred dollars, as hereinbefore mentioned.

That such endorsement, so purporting to be that of the payee of said check, was not, in fact, the endorsement of the person named in the said check as the payee thereof, and both plaintiff and defendant were mistaken in believing, as they did believe, that it was; that said endorsement had, in fact, been forged by some other person than the payee and without the payee's knowledge, consent, or authority.

That plaintiff, after paying said check as aforesaid, credited itself with the amount thereof and charged the same against the said Bank of British North America in its account with this plaintiff and notified said bank thereof, and said bank assented to such credit and charge.

That neither this plaintiff nor the said defendant had any knowledge or suspicion or reason to believe that the said endorsement purporting to be that of the payee of said check was not genuine until notified by the said Bank of British North America, in the summer of 1877, that the said endorsement of said payee was not genuine, and that this plaintiff had not paid the amount
8 of the said check to the payee therein named or to any one entitled to receive it, and that the said drawer elected to charge this plaintiff with the amount of said check and to withdraw and cancel the credit which it had allowed this plaintiff on account of the payment thereof, and that this plaintiff should be charged, in its account with said Bank of British North America, with the amount of the said check, and then and there tendered the said check to this plaintiff and demanded of this plaintiff payment of or credit in its said account for the amount thereof and interest.

That this plaintiff immediately thereupon notified the defendant of such allegations, claim, and demand of said Bank of British North America and tendered said check to the defendant and requested defendant to take up the same and repay to this plaintiff the amount so paid to the defendant as aforesaid, and interest, which the defendant refused and neglected to do.

That on or about the 7th day of November, 1877, the said Bank of British North America commenced an action in the superior court of the city of New York against this plaintiff to recover the amount of the said check and interest on the ground that the said endorsement on said check purporting to be that of the payee thereof was not her endorsement or made by her authority or assent. This plaintiff immediately notified the defendant herein of the commencement of the said action, and subsequently and before the trial of said action requested said defendant to assume the defence
9 thereof or to take such proceedings as it might see fit in regard thereto, and notified it that this plaintiff would hold it bound by the judgment which might be rendered in the said action.

That such proceedings were thereafter had in the said action that on or about the 7th day of March, 1881, the said Bank of British North America recovered judgment against this plaintiff for the

sum of seventeen thousand five hundred dollars and the interest from July 20th, 1877, and the plaintiff's costs of said action, and judgment was in said action finally entered against this plaintiff for the sum of twenty-two thousand five hundred and twenty-three $\frac{47}{100}$ dollars damages and costs, whereof twenty-one thousand eight hundred and seven $\frac{52}{100}$ dollars were for damages, of which seventeen thousand and five hundred dollars were for principal and the residue was for interest and seven hundred and fifteen $\frac{95}{100}$ dollars were for costs.

That this plaintiff gave due notice to the said defendant of the said judgment and also during the progress of the said cause from time to time gave notice to the said defendant, and the defendant also otherwise had notice of the proceedings therein and requested the said defendant to participate in or assume the defense thereof or take such proceedings in regard thereto as it might see fit, all of which the said defendant neglected and refused to do; and after the recovery of said judgment this plaintiff again tendered said check and demanded that the defendant should take up the same
10 and pay the amount thereof so paid to the defendant thereon as aforesaid and interest, but defendant refused and this plaintiff now brings into court the said check and hereby offers to deliver and return the same to the said defendant on payment of the amount so paid thereon and interest, as herein demanded.

That one of the issues in said action was as to the genuineness of the endorsement of the payee of said check, and the same was submitted to the jury impanneled to try said action and the issues therein, and said jury found and rendered a verdict that the said endorsement was not the genuine signature of said payee or made by her authority or assent, and thereon judgment was rendered against this plaintiff in said action, and by said judgment it was so adjudged.

Wherefore this plaintiff demands judgment against the said defendant for the sum of seventeen thousand five hundred dollars and interest thereon from the 20th day of June, 1877, or for such other and further relief as this plaintiff may be entitled to, and the costs of this action.

BURRILL, ZABRISKIE & BURRILL,
Plaintiff's Attorney.

11 CITY AND COUNTY OF NEW YORK, *ss:*

Cornelius V. Banta, being duly sworn, says that he is the cashier of the Merchants' National Bank of the city of New York, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

C. V. BANTA.

Sworn to before me this twentieth day of March, 1883.

J. G. BALDWIN,
Notary Public in and for the County of New York.

(Endorsed:) Supreme court, city and county of New York. The Merchants' National Bank of the City of New York against The Leather Manufacturers' National Bank. Original complaint. Burrill, Zabriskie & Burrill, attorneys for plaintiff, (Mills' Building), 21 Broad St., New York. Due service of a copy of the within complaint is hereby admitted. March 20, 1883. Man & Parsons. U.S. circuit court. Filed Sept. 13, 1883. Timothy Griffith, clerk.

12 *Notice of Appearance.*

Supreme Court, City and County of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

Please take notice that we are retained by and hereby appear for the defendant in the above-entitled action, and demand that a copy of the complaint, and all the papers in this action, be served on us at our office, number 56 Wall street, New York city. P. O. address box 1683 N. Y. city.

Dated New York, Dec. 13, 1877.

Yours, &c,, MAN & PARSONS,
Defendant's Attorneys.

To Burrill, Davison & Burrill, Esqs., plaintiff's attorneys.

(Endorsed:) Supreme court. The Merchants' National Bank of the City of New York against The Leather Manufacturers' National Bank. Notice of appearance. Man & Parsons, def't's attorneys, 56 Wall St., N. Y. To Burrill, Davison & Burrill, plaintiff's attorneys. U. S. circuit court. Filed Sept. 13, 1883. Timothy Griffith, clerk.

13 *Notice of Appearance.*

Circuit Court of the United States, Southern District of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

SIR: Please to take notice that the defendant, The Leather Manufacturers' National Bank, appears in this action and that we are retained as attorneys for it therein.

Dated New York, Sept. 17th, 1883.

Yours, &c., MAN & PARSONS,
Defendant's Attorneys.

Post-office address: No. 56 Wall St., New York city, N. Y.

To clerk of the cir. c't of U. S., southern district of New York.

(Endorsed:) Circuit court of U. S., southern dist. of N. Y. The Merchants' National Bank of the city of New York, plaintiff, against The Leather Manufacturers' National Bank, defendant. Notice of appearance. Man & Parsons, defendant's att'ys, 56 Wall St., N. Y. U. S. circuit court. Filed Sept. 17, 1883. Timothy Griffith, clerk.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

The defendant, by Man & Parsons, its attorneys, answers the plaintiff's complaint as follows:

1. This action was commenced on December 7th, 1877, by the service on that day on the defendant of a summons with notice that the amount for which payment was asked was $17,500, with interest from January 1st, 1872.

So far as concerned all allegations of the complaint which set forth matters subsequent to the commencement of the action, the defendant reserves the objection that they are immaterial and irrelevant to the cause of action for which the suit was brought, and that they cannot be pleaded in the complaint, and that the defendant is not required to make answer thereunto, and that they cannot sustain or aid to sustain the cause of action sued for.

2. This defendant is informed and believes that the said Bank of British North America did not object to be- charged by the plaintiff with the said check at the time that the charge was made.
15 Whether it assented to such charge in any other way this defendant has no knowledge or information sufficient to form a belief.

3. As this defendant is informed and believes, the name purporting to be that of the payee of the said check as endorsed thereon did not correspond with the name as written in the body of the check; that there was a difference sufficient to lead to inquiry and which required the plaintiff to make inquiry before paying the check; that if such inquiry had been made the forgery would have been discovered; that it was negligence to pay the check without such inquiry; that this defendant itself paid the full amount of the said check to the party from whom it was received, and that the plaintiff, for its negligence in that regard as this defendant is advised and believes, must suffer the consequences.

This defendant denies all allegations of fact in the complaint to the contrary of the above averment.

4. This defendant has no knowledge or information sufficient to form a belief that the notice alleged to have been received by the plaintiff from the Bank of British North America in the summer of 1877 stated that the drawer of the check elected to charge the plaintiff with the amount thereof and to withdraw and cancel the credit which the drawer had allowed the plaintiff on account of the payment thereof, and that the plaintiff should be charged in its account with said Bank of British North America with the amount of the said check, or that the drawer demanded credit in its
16 account for the amount thereof and interest. As this defendant is informed and believes, the demand of the Bank of British North America was that the amount of the check, with interest, should be paid by the plaintiff to it.

5. This defendant denies that the plaintiff immediately upon such alleged demand or at all notified it of any such pretended allegations, claim, or demand of said Bank of British North America, or tendered said check to this defendant, or requested this defendant to take up the same or to repay to the plaintiff the amount paid to it or interest, or that the defendant refused or neglected any such demand. It was not until long after the commencement of this action and quite recently that the plaintiff tendered the said check to this defendant or demanded the amount thereof.

This defendant did then refuse and neglect to comply with such demand.

6. This defendant has no knowledge or information sufficient to form a belief of the particulars of the proceedings in the said action of the Bank of British North America against the plaintiff. For all such particulars and proceedings it refers to the record of such action as the same shall be produced by the plaintiff if it shall be held that the same are material and relevant.

7. This defendant admits that the plaintiff notified it of the commencement of such action, and that before the trial it gave a further notice of the pendency of such action. Such notices are not
17 fully or accurately set forth in the complaint. For the contents thereof the defendant refers to the same as they shall be produced by the plaintiff.

8. And for further answer to the complaint this defendant says that the alleged cause of action herein did not accrue within six years before the commencement of this action, for which reason, as this defendant is advised and believes and by way of defense pleads, this action cannot be maintained against it.

Wherefore the defendant asks that the complaint of the plaintiff may be dismissed with costs.

MAN & PARSONS,
Def't's Atty's, 56 Wall St., N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

Nicholas F. Palmer, being duly sworn, deposes and says that he is the president of the defendant above named, that he has read the foregoing answer and knows the contents thereof; the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

NICHOLAS F. PALMER.

Sworn to before me this 8th day of June, 1883.

R. W. ROBINSON,
Notary Public, Kings County.

18 (Endorsed:) Supreme court. The Merchants' National Bank of the City of New York *vs.* The Leather Manufacturers' National Bank. Copy. Answer. Man & Parsons, def't's atty's, 56 Wall St., N. Y. To Burrill, Zabriskie & Burrill, Esqs., pl'f's atty's. Rec'd June 8th, '83. U. S. circuit court. Filed Sept. 13, 1884. Timothy Griffith, clerk.

19 U. S. Circuit Court, Southern District of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK

against

THE LEATHER MANUFACTURERS' NATIONAL BANK.

This action having been commenced in the supreme court of the State of New York, and having been removed therefrom into this court upon the application of the plaintiff, pursuant to the statute in such case made and provided, and the plaintiff having this day filed in the office of the clerk of this court and entered therein a copy of the record of this action in said supreme court of the State of New York, and the plaintiff having appeared herein by Burrill, Zabriskie & Burrill, its attorneys, now, on motion of Burrill, Zabriskie & Burrill, plaintiff's attorneys, it is hereby ordered that this action do proceed in this court as if it had been originally commenced herein, and that the appearance of the plaintiff herein
20 by Burrill, Zabriskie & Burrill, its attorneys, be, and hereby is, noted.

Dated New York, September 13th, 1883.

BURRILL, ZABRISKIE & BURRILL,
Pl'ff's Att'ys.

21 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 6th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable William J. Wallace, circuit judge.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK

vs.

THE LEATHER MANUFACTURERS' NATIONAL BANK.

This case being still on trial the jurors sworn in it are called and severally answer to their names.

The court denies the motion to direct a verdict for the defendant, and Mr. Parsons excepts to the ruling of the court in so doing.

Mr. Burrill moves that the court direct the jury to find a verdict for the plaintiff for the sum of $24,742.08. The court grants said motion, and directs the jury to find for the plaintiff for the sum of $24,742.08.

The jury say that, by direction of the court, they find a
22 verdict for the plaintiff for the sum of twenty-four thousand seven hundred and forty-two dollars and eight cents ($24,742.08), and so say they all.

On motion of Mr. Parsons, ordered that the defendant have a stay of proceedings on said verdict for thirty days.

23 U. S. Circuit Court Southern District of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

The direction of the court is that the jury find a verdict for the plaintiff for $17,500, and interest from June 20, 1877.

The jury, by direction of the court, finds a verdict for $25,184.83.

(Signed) WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. The Merchants' National Bank of the city of New York ag'st The Leather Manufacturers' National Bank. Order of Wallace, J. U. S. circuit court. Filed Jan. 17, 1884. Timothy Griffith, clerk.

24 And afterwards, and on the 13th day of June, 1884, come the attorneys for the respective parties and, after hearing argument, the court orders the said verdict to be amended *nunc pro tunc* so that the interest on the said sum of $17,500 be computed and allowed the plaintiff at the rate of seven per cent. from June 20, 1877, to January 1, 1880, and at the rate of six per cent. thereafter to the time of the trial, whereby the said verdict is for the sum of $25,184.83.

The clerk will correct the minutes by adding the foregoing.

(Signed) WM. J. WALLACE.

(Endorsed:) U. S. circuit court. Filed Jun- 24, 1884. Timothy Griffith, clerk.

25 Circuit Court of the United States for the Southern District New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

This cause having been tried at a stated term of this court, held in the city of New York, on the 5th and 6th days of May, 1884, before Hon. William J. Wallace, circuit judge, and a jury, and the jury having rendered a verdict for the plaintiff by direction of the court for twenty-five thousand one hundred and eighty-four $\frac{83}{100}$ dollars;

And the costs of the plaintiff and interest on the verdict up to the date of the entry of this judgment having been adjusted by
26 the clerk of this court, at the sums of forty-eight and $\frac{22}{100}$ dollars and two hundred and eleven and $\frac{14}{100}$ dollars, respectively; on the pleadings and all the proceedings herein, it is, on motion of Burrill, Zabriskie & Burrill, attorneys for the plaintiff, ordered and adjudged that the plaintiff, The Merchants' National Bank of the city of New York, recover of the defendant, The Leather Manufacturers' National Bank, twenty-five thousand one hundred and eighty-four

and $\frac{83}{100}$ dollars ($25,184.83), the amount of the verdict; two hundred and eleven and $\frac{14}{100}$ dollars interest thereon to the date of the entry of this judgment, and forty-eight and $\frac{22}{100}$ dollars costs as adjusted, making together the sum of twenty-five thousand four hundred and forty-four and $\frac{19}{100}$ ($25,444.19) dollars, and that said plaintiff have execution therefor.

Judgment signed this 27th day of June, A. D. 1884.

27 (S'g'd) JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed over all:) U. S. circuit court, S. D. of N. Y. The Merchants' National Bank of the City of New York against The Leather Manufacturers' National Bank. Judgment. Burrill, Zabriskie & Burrill, attorneys for plaintiffs, 21 Broad St., New York. U. S. circuit court. Filed Jun- 27th, 1884, 12.40 p. m. Timothy Griffith, clerk.

28 *Bill of Exceptions.*

Circuit Court of the United States, Southern District of New York.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff,
against
THE LEATHER MANUFACTURERS' NATIONAL BANK, Defendant.

This action and all the issues therein joined came on for trial before Hon. William J. Wallace, circuit judge, and a jury, on May 5th, 1884.

For the plaintiff, Mess. Burrill, Zabriskie and Burrill, attorneys, and Mr. John E. Burrill, of counsel; for the defendant, Mess. Man & Parsons, attorneys, and Mr. John E. Parsons, of counsel.

The plaintiff, to maintain the issues on its behalf, called as a witness JOHN P. KINGSFORD:

I am a lawyer. I was counsel for the Bank of British North America in 1877 in an action brought by that bank against the plaintiff in this action.

(Check shown witness.)

This is the check which was the subject of litigation in that action.

On June 2d, 1877, I first called at the Merchants' Bank.

29 I saw Mr. Vermilye, the president, and Mr. Banta, the cashier. I told them I had come about this check; that the payee claimed that her endorsement was a forgery, and that under those circumstances, on behalf of the Bank of British North America, I made a demand on them for the amount of the check. Subsequently, in the same conversation, I said we would throw off the interest if they would pay us the check.

I left the check with Mr. Banta; about the 21st of the same month it was sent to me again by the Bank of British North America; that was the next time I saw it.

At the interview on June 2d, Mr. Vermilye and Mr. Banta said their bank was not liable. They did not pay the check until we got

judgment against them. We commenced our suit against the Merchants' Bank November 7th, 1877.

Plaintiff's counsel offers in evidence the judgment record in the action of the Bank of British North America against the Merchants' National Bank, including all proceedings to final judgment on the remittitur from the court of appeals.

The action was in the superior court of the city of New York, and was brought to recover the amount of the check now in controversy, which had been charged in the account rendered by the Mer-
30 chants' Bank to Bank of British North America, as a depositor, upon the ground that the payment of the check by the Merchants' Bank had been made upon a forged endorsement of the payee, Mrs. Halpine, and that the amount had been demanded in June, 1877, and refused. Defense, that the indorsement was genuine and that the cause of action was barred by the statute of limitations. Verdict and judgment for the plaintiff. Affirmance at the general term and in the court of appeals. Judgment on remittitur from the court of appeals entered January 22nd, 1883, for the sum of $17,500, interest from June 2nd, 1877, amounting to $4,311.52, and costs, $715.95.

Receipt for the amount of said judgment and statement of computation read in evidence as follows:

PLAINTIFF'S EXHIBIT NO 1.

Superior Court of the City of New York.

THE BANK OF BRITISH NORTH AMERICA
against
THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK.

NEW YORK, *January 25th*, 1883.

31 Received from Burrill, Zabriskie & Burrill the sum of twenty-five thousand two hundred and ninety-two $\frac{22}{100}$ dollars in full satisfaction and discharge of the judgments in the above-entitled action.

JOHN P. KINGSFORD,
Attorney for Pl'ff.

PLAINTIFF'S EXHIBIT NO. 2.

Memo. of Am't Due Jan'y 23, '83.

BANK OF BRITISH NORTH AMERICA
vs.
MERCHANTS' NATIONAL BANK.

Am't judg't ent'd M'ch 7, 1881	$22,523 47
Int. on same M'ch 7, '81, to Jan. 23, '83, at 6 %, 1 yr. 10 mo. 16 days	2,537 64
Am't judg't ent'd Dec. 8, '81	105 63
Int. on same Dec. 8, '81, to Jan. 23, '83, at 6 %, 1 yr. 1 mo. 15 days	7 13
Court of appeals' costs	110 82
Total	25,284 69

Jan. 25, '82, 2 d'ys' int. on $22,523.47		7 50
" 25, '83, " 105.63		03
		25,292 22

Rec'd January 25, 1883.

BURRILL, ZABRISKIE & BURRILL.

32 PLAINTIFF'S COUNSEL: I suppose we can only recover the principal of the check with interest and without the costs recovered against us; we claim interest from June 20th, 1877, the date from which interest was allowed to the Bank of British North America.

Cross-examination of witness KINGSFORD:

The Bank of British North America kept a deposit account in the Merchants' Bank. The amount of this check had been charged in that account.

On June 2d I first demanded the amount of the check. The Merchants' Bank did not at that time give me a definite answer. They asked me to leave the check so that they might look into it. About June 13 or 14 the Merchants' Bank asked for an affidavit from Mrs. Halpine that the endorsement was forged, and I drew such an affidavit and sent it to my clients.

At the interview of June 2nd Mr. Vermilye and Mr. Banta asked me to leave the check for examination.

Redirect:

The check was returned by the Merchants' Bank to the Bank of British North America on June 20. I commenced suit on November 2nd, 1877.

Letter from plaintiff to defendant of December 8th, 1877, read in evidence by plaintiff's counsel.

33 PLAINTIFF'S EXHIBIT 4.

MERCHANTS' NATIONAL BANK
vs.
THE LEATHER MANUFACTURERS' BANK.

P. O. box 4601.

John E. Burrill. Charles A. Davison. Charles D. Burrill.

Burrill, Davidson & Burrill, attorneys & counsellors at law, 68 & 70 William street.

NEW YORK, *Dec'r 8th*, 1877.

David L. Holden, Esq., cashier, &c.

DEAR SIR: We are authorized to inform you that the above suit has been commenced in consequence of an action brought against the Merchants' Bank by the Bank of British North America on a check paid by the Merchants' Bank to your bank, and the signature of the payee of which check is claimed to have been forged.

As the above suit was commenced by the Merchants' Bank to protect itself against the suit commenced against it, it is proposed that all proceedings herein be suspended until the decision of the action against the Merchants' Bank.

Yours, &c., BURRILL, DAVISON & BURRILL.

34 It is admitted that the present suit was begun December 7th, 1877; also that the Bank of British North America sued the plaintiff by a suit commenced on the 7th of November, 1877.

Plaintiff's counsel reads in evidence letters from plaintiff to defendant of May 26th, 1879, and September 30, 1880:

PLAINTIFF'S EXHIBIT 5.

N. Y. Superior Court.

THE BANK OF BRITISH NORTH AMERICA
vs.
THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK.

NEW YORK, *May 26th*, 1879.

To the Leather Manufacturers' National Bank:

You will please take notice that this action has been brought to recover from this bank the amount of a check paid to you, dated March 9th, 1870, for $17,500, drawn by A. Mackinlay and Jas. S. Lockie for Bank of British North America, payable to the order of Margaret G. Halpine, and on which the names of Margaret G. Halpine and Wm. C. Barrett are endorsed, and the ground of said suit is that the endorsement "Margaret G. Halpine" on said check was forged and counterfeit and was not made by the Margaret G.
35 Halpine named in said check as the payee.

The said action is at issue in said court and will shortly be tried, and this notice is given in order to afford you an opportunity of defending such suit and of introducing such testimony and of employing such counsel to defend the same as you may deem proper, and also to enable you to protect your rights and interests in the matter in any way you may desire; and we shall claim that the judgment in said action, if against us, shall be conclusive upon you.

Yours, &c., MERCHANTS' NAT. BANK,
By C. V. BANTA, *Cashier.*

PLAINTIFF'S EXHIBIT 6.

P. O. box 4601.

John. E. Burrill. Charles A. Davison. Charles D. Burrill.
George Zabriskie.

Burrill, Davison & Burrill, attorneys & counsellors at law, 68 & 70 William street.

NEW YORK, 30*th September*, 1880.

To the Leather Manufacturers' National Bank:

36 Referring to our letter of May 26, 1879, we beg to inform you that the case of the Bank of British North America

against us is on the calendar of the superior court for October for trial, and to renew the invitation which we then extended to you that you should defend that suit, or assist us in the defence of it, either on the trial or before, or otherwise, with evidence, the attendance of your counsel, or in such other way as you may desire.

We thus notify you, as we have heretofore notified you, in order that if this cause be decided adversely to us the judgment therein may be conclusive upon you.

Yours, &c., MERCHANTS' NAT. BANK,
By C. V. BANTA, *Cashier.*

The following facts were admitted: That the check hereinafter set forth was on the 9th day of March, 1870, drawn and delivered to William Thomas Thompson and William M. Ramsay by the Bank of British North America, and that the Merchants' National Bank of the city of New York, on the same day, by the certificate thereon written, accepted the same:

"No. 169. NEW YORK, *March* 9, 1870.

37 The Merchants' National Bank pay to Margaret G. Halpine, or order, seventeen thousand five hundred dollars in current funds.

$17,500. A. McKINLAY,
JAS. S. LOCKIE,
— *Bank of British North America.*

[2-cent stamp.]

Walter Watson, Clarence M. Mybrea, Archibald McKinlay, agents.

(On the face stamp:) Good at Merchants' National Bank. —— ——, teller.

(Written across stamp:) Banta.

(Endorsed:) Margret G. Halpine. Wm. C. Barrett. The number 18. For deposit by Howes & Macy.

That when said check was drawn the said Bank of British North America had on deposit with said Merchants' Bank funds sufficient wherewith to pay said check.

That according to the usual course of dealing between the Bank of British North America and the Merchants' Bank, the pass-book containing the entries of the deposits made by said Bank of British North America with said Merchants' Bank, and of the payments made by the Merchants' Bank on account thereof, was written up and returned to the Bank of British North America every

38 fortnight, together with the checks or other vouchers for the payment of the moneys so entered in said book as paid; that the said check was on the 10th day of March, 1870, charged by the Merchants' Bank on its own books against said Bank of British North America in its account with said Merchants' Bank, and on the 17th day of March, 1870, in accordance with said course of dealing, the said pass-book containing said charge and said account was balanced and returned to said Bank of British North America, together with said check, as a voucher for said charge.

That the account between the Bank of British North America and the Merchants' Bank had, at all times since the said ninth day of March, 1870, continued down to and still existed on February 21, 1881, the day of the trial of the action brought on said check by the Bank of British North America against the Merchants' Bank.

That the Bank of British North America had no notice or knowledge that the signature "Margret G. Halpine," endorsed on said check, was questioned or disputed, or that it was claimed that the same was not her genuine signature, until on or about the 24th day of January, 1877.

That said Bank of British North America, on the 26th day
39 of said January, 1877, gave the Merchants' Bank the following notice:

JAN. 26, 1877.

C. V. Banta, Esq., cashier Merchants' National Bank, New York.

DEAR SIR: We have been advised that legal proceedings have been instituted in connection with a check drawn by the agents of this bank upon your bank, dated 9th March, 1870, to the order of Margaret G. Halpine for $17,500, and we deem it our duty to notify you that the signature of that payee on that check is questioned.

I am, dear sir, your obed't servant,

(Signed) D. A. McTAVISH, *Agent.*

That said Bank of British North America, on the 10th day of August, 1877, gave the Merchants' Bank the following notice:

AUGUST 10, 1887.

The Cashier Merchants' National Bank, New York.

40 SIR: Referring to my letter of 26th January last, I now beg to inform you that suit has been commenced against us for recovery of the amount check mentioned therein, the allegation affirming that you paid the same upon a forged endorsement, and we beg to notify you that, in the event of our being held liable for the amount of the check, we shall be obliged to hold you to your strict legal liability to us.

I am, sir, your obed't servant,

D. A. McTAVISH, *Agent.*

That on the 20th day of June, 1877, the said Bank of British North America demanded from the said Merchants' Bank the payment of the amount of said check so charged as aforesaid against said Bank of British North America by said Merchants' Bank in the accounts between, them and tendered to them the check, and said Merchants' Bank refused to pay the same.

That the signature, Margret G. Halpine, endorsed on said check, was not her genuine signature, and was not made by her or by her authority.

That the other endorsements on the said check are the genuine endorsements of the parties by whom the same purport to have been made.

41 Plaintiff's counsel calls for and defendant's counsel produces letter from plaintiff to defendant of March 15, 1883. Read in evidence.

The letter, omitting certain portions excluded by the court on defendant's motion, is as follows:

THE MERCHANTS' NATIONAL BANK,
NEW YORK, *March 15th*, 1883.

N. F. Palmer, Esq., President Leather Manf. Nat. Bank, New York city.

DEAR SIR: The judgment recovered by the Bank of British North America against this bank on the check for $17,500 drawn on us and paid to you through the clearing-house on March 10th, 1877, has been affirmed by the court of appeals.

The judgment was recovered on the ground that the endorsement of the payee of the check was forged and not made by her authority or assent, and we are advised that such fact is now conclusively established. * * *

You will find annexed a statement of the items of the amount paid by us to the British bank. It includes interest only from the 20th of June, 1877, which was the time when that bank first called on us to pay the check, and we suppose that our claim for interest against you runs only from that time. * * *

42 Having now paid the judgment, we tender the check to you and ask payment of the amount of it and interest from July 1st, 1877. You will see by the statement that we have paid a much larger amount, to say nothing of the fees of our own counsel.

Hoping for a favorable response from you, I remain

Yours very truly, C. V. BANTA, *Cashier*.

Memo. of Am't Due Jan'y 23rd, 1883.

Statement referred to in the annexed letter to N. F. Palmer, Esq., pres't, of this date.

BANK OF BRITISH NORTH AMERICA *vs.* MERCHANTS' NAT. BANK.

Am't of judgment ent'd M'ch 7th, 1881	$22,523 47
Int. from M'ch 7, '81, to Jan'y 23, '83, 1 yr. 10 mos. 16 days, 6%	2,537 64
Am't of judgment ent'd Dec. 8, '81	105 63
Int. on same from Dec. 8, '81, to Jan'y 23, '83, 1 yr. 1 mo. & 15 days, 6%	7 13
Court of appeals' costs	110 82
Jan'y 25, '83, two days' int. on $22,523.47	7 50
" " " " " $105.63	03
	$25,292 22

C. V. BANTA, *Cas.*

Plaintiff's counsel read in evidence letter from defendant to plaintiff of March 17, 1883:

43 Leather Manufacturers' National Bank, 29 Wall street. N. F. Palmer, president; D. L. Holden, cashier.

NEW YORK, *March* 17, 1883.

C. V. Banta, Esq., cashier Merchants' Nat'l Bank.

DEAR SIR: Your letter of 15th instant is at hand, in which you mention that a judgment has been recovered by the Bank of British North America against your bank on account of a check for $17,500, under circumstances which you also mention.

I have only to reply that this bank does not recognize any liability on its part growing out of the transaction you refer to.

Very respectfully yours, &c., N. F. PALMER, *P't.*

CORNELIUS V. BANTA, called for plaintiff, sworn:

I have been cashier *to* the Merchants' National Bank since 1872. Prior to that I had been paying teller 10 or 12 years. (Check in controversy shown witness.) I certified that; that is my signature. In 1870 the Bank of British North America had the usual depositor's account with our bank, and continued without change until
44 about 18 months ago, when it was changed by dividing the account. They had a pass-book with our bank. The amounts paid for checks were charged in the pass-book and the checks returned with the pass-book as vouchers.

This check was paid by us to the Leather Manufacturers' National Bank through the clearing-house on March 10, 1870. The check then bore all the marks that it now has.

After paying the check I first heard of it again in June, 1877. When Mr. Kingsford presented it and demanded the money I asked him to leave the check to look into it. I had it perhaps ten or twelve days. I afterwards returned it to the Bank of British North America.

The moment Mr. Kingsford left the check with me I took it over to the Leather Manufacturers' Bank and presented it to Mr. Holden, the cashier, and told him that the bank of British North America had made a demand on us for the money and of course I should have to do the same thing with him, and expected him to return the money; that from the look of the thing there was going to be considerable trouble about it. They looked at it. He said he had nothing to do with it, or couldn't do anything about it, or something to that effect. In that conversation I told him what the trouble was—what the British bank claimed; I alluded to Mr. Barrett. I told him that they demanded the money on account of the
45 endorsement of Mrs. Halpine being forged.

I told him what the trouble was; that they demanded the money on account of the endorsement of Mrs. Halpine being forged. I told him what the British bank had done, and that I came over to do the self-same thing with him, and expected him to return the money, and demanded the money; I think I used the words "de-

mand the money." That was what I went over there for. I think his answer was that he did not know anything about it. He did nothing about it. After that I returned the check to the British Bank.

Check read in evidence.

PLAINTIFF'S EXHIBIT No. 9.

NEW YORK, *9th Mar.*, 1870.

The Merchants' National Bank pay to Margaret G. Halpine or order seventeen thousand five hundred $\frac{00}{100}$ dollars in current funds.

$7,500. A. McKINLAY.

[2-cent stamp.]

JAS. S. LOCKIE,
Agents Bank British North America.

Walter Watson, Clarence M. Myrea, Archibald McKinlay.

(On face stamp:) Good at Merchants' National Bank. —— —— teller.

(Written across stamp:) Banta.

(Endorsed:) Margret G. Halpine, Wm. C. Barrett. For deposit by Howes & Macy.

46 Cross-examined:

Howes & Macy, who endorsed this check, were depositors in the Leather Manufacturers' Bank; they were private bankers; they failed in September, 1873.

I notice that the first endorsement on the check does not correspond with the name of the payee. If I were a bank officer I would have paid that check with a responsible endorsement on it, notwithstanding the discrepancy; without any other endorsement I would not have paid it. A check of this description wouldn't have been paid at all—of this amount—unless the endorsement had been guaranteed by some responsible parties.

My first visit to the Leather Manufacturers' Bank about this check was either on the same day that Mr. Kingsford demanded payment from us or the day after. I remember that Mr. Kingsford demanded payment, and that we did not pay nor say we would pay, but asked that the check might be left so that we could examine it; we subsequently returned it to the Bank of British North America—I think to Mr. McTavish, the agent in this city. I think at that time we had been furnished with Mrs. Halpine's affidavit that the endorsement was a forgery Notwithstanding that we did return the check to the Bank of British North America, refusing to pay the amount to that bank, and always refused to pay until after the decision of the court of appeals.

47 The check belongs to the plaintiff now; it never came into the plaintiff's possession so as to be retained as its property until after the judgment of the court of appeals; when we paid that judgment in 1883 the check came to us.

I went to the Leather Manufacturers' Bank and had the interview

with Mr. Holden directly after Mr. Kingsford's visit to our bank and before I received Mrs. Halpine's affidavit; Mr. Kingsford left the check with us in accordance with our request that he would do so as a favor to us.

JOHN P. KINGSFORD recalled.

Cross-examined:

My recollection of what took place on June 2nd, 1877, is that, after some dispute and talk about this matter, Mr. Banta asked me if I would leave that check so that they could look into the matter, and I said I would; that is all that took place, except that Mr. Banta was to return it to us if they did not pay it. I told him we would trust him with the check.

Plaintiff's counsel tenders to the defendant on the trial the check in suit.

It is admitted that the check in controversy was paid by the defendant bank to Howes & Macy, its depositors, in the usual course of business March 10, 1870.

It is also admitted that the forgery of the endorsement was
48 committed by the second endorser, who absconded in March, 1876.

Testimony closed.

The defendant asks instructions for a verdict upon the grounds—

First. That the cause of action, if complete, did not accrue within six years before the commencement of this suit.

Second. That the cause of action, if a demand and tender were necessary, had not accrued when the suit was commenced.

Motion denied; exception by defendant.

The plaintiff moves for instructions for a verdict for the amount of the check, and interest from June 20th, 1877.

The court granted the said motion and directed the jury to render a verdict for $17,500, and interest from June 20, 1877; to which direction the defendant duly excepted.

Plaintiff requests the court to rule that the rate of interest is seven per cent. to January 1, 1880, and six per cent. thereafter.

The defendant objected to the computation of interest at a rate greater than six per cent. for the whole period for which interest is to be computed.

The court ruled that interest must be computed at the
49 rate of seven per cent. up to January 1, 1880, and at six per cent. thereafter. To which ruling defendant duly excepted.

It is admitted that the interest, according to the rule laid down by the court, amounts to $7,684.83.

The jury rendered a verdict in accordance with the direction of the court for $25,184.83.

And because the said matters do not appear by the record of this action the defendant makes this bill of exceptions.

A. P. & W. MAN,
Def't's Att'ys.

error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 22d, 1884.

WM. J. WALLACE.

56 [Endorsed:] U. S. Supreme Court. 481. The Leather Manufacturers' National Bank, plaintiff in error, against The Merchants' National Bank of the City of New York, defendant in error. Citation. Jno. E. Parsons, att'y for pl'ff in error, 111 Broadway, New York. Service of a copy of within citation is hereby admitted this 23d day of Sept., 1884. Burrill, Zabriskie & Burrill, att'ys for def'ts.

[Stamped:] U. S. circuit court. Filed Oct. 1, 1884. Timothy Griffith, clerk.

[Stamped:] A. P. & W. Man. Sep. 23, 1884.

Endorsed on cover: S. New York C. C. U. S. No. 96. The Leather Manufacturers' National Bank, plaintiff in error, *vs.* The Merchant's National Bank. Filed 13th October, 1884.

Office Supreme Court U. S.
FILED.
NOV 17 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 96.

THE LEATHER MANUFACTURERS, NATIONAL BANK,

Plaintiff in Error,

vs.

THE MERCHANTS' NATIONAL BANK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JNO. E. PARSONS,

Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 96.

THE LEATHER MANUFACTURERS NATIONAL BANK,
Plaintiff in Error,

vs.

THE MERCHANTS NATIONAL BANK,
Defendant in Error.

Brief for Plaintiff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

On March 9th, 1870, the Bank of British North America drew its check for $17,500 on the Merchants, &c., Bank, payable to the order of Margaret G. Halpine (see check, fol. 37).

On the succeeding day, March 10th, the check was paid through the Clearing House by the Merchants Bank to the Leather, &c., Bank (fol. 44). It had been deposited with the Leather Bank by Howes & Macy, private bankers (fols. 46, 48). They had received on deposit from William C. Barrett, who had forged the endorsement of Mrs. Halpine (fol. 48). Howes & Macy failed in September, 1873 (fol. 46). In March, 1876, Barrett absconded (fol. 48).

On or about June 2d, 1877, the British Bank learned that Mrs. Halpine claimed that her endorsement was forged. On that day Mr. Kingsford, its attorney, called upon the Merchants Bank and made a demand for the amount of the check. The bank officers denied that their bank was liable (evidence of Mr. Kingsford, examined as

a witness for the Merchants Bank, fol. 29), and on June 20th they refused payment (admission, fol. 40).

On November 7th, 1877, the British Bank brought suit against the Merchants Bank to recover the amount of the check, upon the ground that the endorsement of Mrs. Halpine was forged; that the amount had been demanded and refused; and that it still remained to their credit with the Merchants Bank. The defense of the Merchants Bank was that the endorsement was *genuine*, and that the cause of action was barred by the Statute of Limitations (fol. 30).

Judgment in favor of the British Bank was entered on March 7th, 1881; affirmed in banc on December 8th, 1881, and affirmed by the Court of Appeals of the State of New York on January 22d, 1883. On January 25th, 1883, the Merchants Bank paid the judgment (fols. 30 to 32).

At the interview of June 2d, 1877, the officers of the Merchants Bank asked Mr. Kingsford to leave the check with them *for examination* (Mr. Kingford's evidence, fol. 32).

Mr. Banta's (cashier of the Merchants Bank) version of what occurred when Mr. Kingsford presented the check to his bank is that he asked him " to leave the check to *look into it.*" He added that the moment Mr. Kingsford left the check with him he took it over to the Leather Bank, presented it to Mr. Holden, its cashier, and told him that the Bank of British North America had made a demand for the money, " and of course I should have to do the same thing with him and expected him to return the money. That from the look of the thing there was going to be considerable trouble about it. They looked at it. He said he had nothing to do with it, he could not do anything about it, or something to that effect. * * * I told him what the British Bank had done and that I came over to do the selfsame thing with him, and that I expected him to return the money, and demanded the money. I think I used the words 'demand the money.' That was what I went over there for. I think that his answer was that he did not know anything about it. He did nothing about it. After that I returned the check to the British Bank " (fols. 44, 45).

On cross-examination Mr. Banta testified that the check never came into the possession of the Merchants Bank so as to be retained as its property until 1883, when it paid the British Bank and the check was given up (fol. 47).

The present suit was begun on December 7th, 1877 (fol. 34). It asked judgment for the amount of the check and interest from

June 20th, 1877 (fol. 10), upon the ground (fol. 7) that " both plaintiff and defendant were mistaken in believing as they did believe that " the indorsement was genuine.

On May 20th, 1879 (fol. 34), and September 30th, 1880 (fol. 36), the Merchants Bank notified the Leather Bank of proceedings in the British Bank's suit, for the purpose of committing the Leather Bank to the result of that suit on the question whether or not the indorsement was forged. And on March 15th, 1883, the Merchants Bank having paid the British Bank's judgment, tendered the check to the Leather Bank and demanded payment with interest from July 1st, 1877 (fol. 42).

The Leather Bank defended upon the grounds: first, that the cause of action if complete did not accrue within six years (the New York Statute of Limitations) before the commencement of the suit; and second, that the cause of action, if a demand and tender were necessary, had not accrued when the suit was commenced.

The Court (Wallace, J.) overruled the defense, the Leather Bank excepting; and by the instructions of the Court, the plaintiff in error again excepting, the jury rendered a verdict for the Merchants Bank for the amount of the check, with interest from June 20th, 1877.

If the judgment is sustained and the Leather Bank is compelled to pay, it will be remediless, Howes & Macy, its depositors, having failed and Barrett, the forger, having absconded.

First.

The suit was barred by the Statute of Limitations.

The *locus* of the transaction, and of the *forum* was the City of New York. The New York statute applies.

That statute provides as the period of limitation twenty years where an action is brought upon a sealed instrument. A lesser time than six years is provided for certain classes of actions; and in the case of suits in equity, etc., which are not specially provided for, the period is ten years. The general statute in other cases, including this, is six years.

New York Code of 1876, Sec. 382 *et seq.*
New York Code of 1849, Sec. 90 *et seq.*

The only suspension of the statute is in case of disability, like coverture, infancy, absence, etc. In a certain class of cases *where equitable relief is sought* upon the ground of fraud, the cause of action is not deemed to have accrued until a discovery of the fraud.

The present case does not come within any exception. Section 415 of the New York Code of 1876 puts in the form of an enactment the principle which was previously established by authority, as follows:

"The periods of limitation prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, by special proceeding, defense or otherwise as the case requires, to the time when a claim to that relief is actually interposed by the party as a plaintiff or a defendant in the particular action or special proceeding."

To determine, therefore, whether the suit was barred, all that is necessary is to consider whether more than six years prior to December 7th, 1877, the cause of action was ripe. It certainly was if the Merchants Bank was entitled to an immediate return from the Leather Bank of the amount paid to it.

I. If the case be regarded as that of payment by the Merchants Bank in reliance upon the implied assertion by the Leather Bank of the genuineness of the endorsement, there was an immediate cause of action for the return of the money, whether the Leather Bank is to be regarded as having acted under an innocent mistake or what would present a stronger case upon the merits for the Merchants Bank, is to be regarded as having made a fraudulent misrepresentation.

Leonard vs. Pitney, 5 Wend., 30.
Allen vs. Mille, 17 Wend., 202.
Foot vs. Farrington, 41 N. Y., 164.
Miller vs. Wood, 41 Hun, 600.

Central National Bank vs. North River Bank, 44 Hun, 114, 115:
(Facts identical with that of case at bar.)

By the Court, VAN BRUNT, P. J.: "It subsequently appeared "that these checks had been stolen from the payee thereof, the true "owner, and that they were never endorsed by it; it seems too clear "for argument that the plaintiff had a right to recover back the "money which it had been induced to pay by the false assertion of "ownership or right to collect made by the defendant. The defend-"ant in presenting this check for payment guaranteed the endorse-"ment, and *it is immaterial whether the plaintiff had actually paid*

" *the money again to the payee of the check or not;* the liability to pay " existed, and the defendant has no right to retain money obtained " by the false pretense that it was entitled to receive the money."

Troup vs. Smith, 20 Johns., 33, 34:

By the Court, SPENCER, C. J.: "It was urged on the argument " that the plaintiff's cause of action might be considered as accruing " when he discovered the fraud. * * * It will readily occur to " the profession that courts of law have in many instances intro- " duced great refinements in the construction of statutes, and that in " some instances judges of great celebrity have deplored the first " aberration from the plain and natural meaning of the words of " statutes. With respect to the statute now under consideration, " there has been great latitude of construction, going almost to its " abrogation. * * * Of late courts of law are travelling back to " the support of the plain and obvious meaning of the statute. " After premising this much, the inquiry is, when did the plaintiff's " cause of action accrue? Most certainly when the fraud was con- " summated. * * * I know of no dispensing power which courts " of law possess, arising from any cause whatever; and it seems to " me that when the Legislature in the same statute gives an exten- " sion of time in the case of the arrest or reversal of judgment, in " cases of infancy, &c., it would be an assumption of legislative au- " thority to introduce any other proviso. The plaintiff's case may " be a very hard one, but that affords no reason for construing away " a statute of great public benefit, and which in many cases is a " shield against antiquated and stale demands."

United States Bank vs. Daniel, 12 Pet., 32, 56:

A draft accepted by Daniel having gone to protest the U. S. Bank and he had agreed upon the amount due, in which was included $1,000, the supposed statutory damages for the protest of the bill; $3,000 of the whole amount he paid the U. S. Bank and gave his note for the remainder. Failing to pay this note at maturity, judgment on it was recovered against him by the bank. Shortly after and about six years after the payment of the $3,000, it was discovered that in paying the $1,000 supposed statutory damages all parties had acted under a mistake, the law not attaching any extra penalty to non-payment of such bills. Thereupon Daniel brought this bill to enjoin the bank from collecting $1,000 of the judgment.

BY THE COURT: "Lastly, the appellants rest their defense on the " Statute of Limitations. If the $1,000 claimed as damages were " paid to the bank at the time the bill of exchange was taken up, " then the cause of action to recover the money (had it been well " founded) accrued at the time the mistaken payment was made." The Court then considers the question when the payment was made and concludes "payment was therefore made on the 8th day of

" July, 1819; and the $1,000 could have been sued for then, as well " as in 1827, when the bill of injunction was filed. It follows, the " act of limitation is a bar."

Bree vs. Holbeck, 2 Doug., 654:

Action for breach of implied warranty of the genuineness of a mortgage upon its assignment by defendant to plaintiff. Six years after it was discovered to be a forgery. The assignor was as ignorant of the fact as the plaintiff. *Held*, by Lord Mansfield, C. J., that the statute was a bar to the action.

Howell vs. Young, 5 B. & C., 259:

Assumpsit against an attorney who in 1814 had undertaken that a certain mortgage security was valid. In 1820 it was for the first time discovered that the security was not good, and this action in *assumpsit* was brought. The defense of the statute was sustained.

2. The Merchants Bank may claim that it has the right to treat the suit as presenting the case of an implied warranty by the Leather Bank of its title to the check; or, in other words, of the genuineness of the endorsement through which its title was derived. The complaint of the Merchants Bank does not present such a case or authorize the Court to render judgment upon any such ground.

Passing this, and none the less the statute applied. There was an immediate breach of the warranty and in consequence an immediate right by the Merchants Bank to the return of the money.

Vide cases, *supra.*

The check was drawn to the order of Mrs. Halpine. It was only through her that title could be made. As she did not endorse it, no title passed either to the Leather Bank or to the Merchants Bank.

Graves vs. American, &c., Bank, 17 N. Y., 205.
White vs. Continental Bank, 64 N. Y., 316.
Espy vs. Bank of Cincinnati, 18 Wall, 604.

The right of action of the Merchants Bank was therefore ripe immediately upon payment by it of the amount of the check to the Leather Bank. The Leather Bank had no title to the check; the endorsement of Mrs. Halpine through which its title came was not genuine.

There was no occasion for the Merchants Bank to delay suit until this fact should be judicially determined in some other controversy between other parties or between it and some other party.

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According to the facts as they were and as they were established upon the trial of this action, the Leather Bank was under an immediate obligation to return the money.

Furthermore, the check, according to the due course of business, was returned by the Merchants Bank to the British Bank, its depositor. It was held by that bank either as its own property or as the property of Mrs. Halpine. No tender of the check by the Leather Bank to the Merchants Bank was essential to perfect its cause of action. Neither had the right to use it for any purpose. The Merchants Bank could not make a tender. The Leather Bank could not, by paying, acquire a right to the check.

What took place between the officers of the two banks occurred while the check was in possession of the Merchants Bank merely for the purpose of looking into the transaction. That gave no right to the Merchants Bank to make a tender. The check did not belong to that bank.

Whatever, therefore, is the process of reasoning by which the rights and labilities of the two banks are to be determined, the result is the same, *i. e.* the Statute of Limitations began to run on March 10th, 1870, and before the commencement of this suit (December 7th, 1877) the claim was barred.

3. Judge Wallace overruled the defense of the statute upon the authority of *The Merchants' National Bank of Baltimore vs. The First National Bank of Baltimore, 3 Fed. Rep., 66., S. C. 4 Hughes, 1.*

That case was decided by the learned Chief-Justice at the Maryland Circuit. The transaction was a Maryland one, and the statute under consideration was the Statute of Limitations of Maryland. It is not necessary to overrule that decision that the Leather Bank shall prevail upon this appeal.

It is well settled that upon a question of the Statute of Limitations the local law prevails.

Davie vs. Briggs, 97 U. S., 628, 637 :

By the Court, HARLAN, J. "We are not unaware of the construc-
" tion which the Court has in several decisions placed upon the phrase
" 'beyond the seas' as used in statutes of limitations. * * *
" Our duty is, *without reference to our former decisions*, to adopt in the
" case the construction which the Supreme Court of North Carolina
" has given to the limitation statute of that State. * * * In the
" case of Murray's Lessee vs. Baker (3 Wheat., 541) this Court de-
" cided that the expressions 'beyond seas' and 'out of the

" State ' are analagous, and are to have *the same construction.* But " suppose the same question should be brought before the Court " from a State where the construction of *the same words* had been " long settled to mean, *literally*, '*beyond seas*;' would not the Court " conform to it?"

The question was answered, " yes."

Vide, Barrett vs. Holmes, 102 U. S., 651.
Henderson vs. Griffin, 5 Pet., 151.

That the law as established by the decisions of the New York courts barred the suit, cannot be disputed:

Troup vs. Smith, 20 Johns, 33.
Leonard vs. Pitney, 5 Wend., 30.
Allen vs. Mille, 17 Wend., 202.
Foot vs. Farrington, 41 N. Y., 164.
Bank of Utica vs. Childs, 6 Cow., 238.
Argall vs. Bryant, 1 Sandf., 98.
Central Nat. Bank vs. North River Bk., 44 Hun, 114.
Bordwell vs. Collie, 45 N. Y., 494.

4. If it were necessary I would ask the Court, although with great diffidence, to examine the principle upon which the learned Chief-Justice decided the Maryland case. The case received careful consideration; but the consequences to the plaintiff in error are so serious, and in any case the effect of continuing indefinitely and until all chance of reclamation is gone, the liability of all persons whose names appear as endorsers of a bank check is likely to be so disastrous that the Court is respectfully asked to consider whether the principle can be sustained.

The facts in the Maryland case were substantially the same as those presented in the present suit, with one difference, which the Court may regard as material and important. In the Maryland case the Merchants Bank of Baltimore (the bank sued) had endorsed the check. The check in question was not endorsed by the Leather Bank.

What appeared in the Maryland case was that the check was drawn by the Treasurer of the United States on the First National Bank of Baltimore, payable to the order of one Orndoff. It was endorsed by the Merchants Bank of Baltimore, presented by it to the First National Bank, and paid by that bank. Ten years afterwards it was discovered that the endorsement of Orndorff was a forgery. The United States thereupon brought suit against the First National Bank and recovered judgment. It paid the judgment and then sued

the Merchants Bank to recover what was so paid. In his opinion Judge Waite says :

" To this suit the Merchants National pleaded the Maryland Statute of Limitations, which was three years, and the single question now presented is whether this statute began to run when the draft was paid or when the judgment in favor of the United States against the First National was rendered. If the former, the suit is barred, but if the latter, it is not. The drawee of a bill of exchange, by accepting and paying the bill, admits the genuineness of the signature of the drawer, and his own obligation to pay. An indorsee demands and receives such a payment warrants his title to the bill from the prior parties under whom he claims. The legal effect of this warrant is that the payment is actually made to the order of the payee; and, so far as the title of the indorsee is concerned, will entitle the drawee to credit with the drawer for the amount drawn for. The undertaking is not as to the genuineness of the bill itself, but the title of the holder.

" In this case the First National got credit at the Treasury of the United States for the amount of the draft. It was thus put in actual possession of what the Merchants National guaranteed it would be entitled to. The exchange of the funds of the United States in the hands of the depository for the bill thus became consummated and no right of action on the warranty accrued until, at least, the United States elected to insist on the defect of title and cancel the credit.

" The case of Cowper v. Godmond, 9 Bing., 788, 23 E. C. L., 452, is in principle much like this. There the question was whether a plea of the Statute of Limitations was a bar to an action for money had and received to recover the consideration money of a void annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as an existing annuity within that period. " That question," said the Court, " depends upon another: at what time did the cause of action arise? The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of the annuity. The cause of action was not complete until the last step was taken." In the present case, also, the warranty contemplated two things—First, the giving of the credit by the United States; and, second, its continuance. As the first requirement of this undertaking was complied with, no right of action could arise until the second was broken. That certainly did not occur until the United States elected to take back the credit it had given.

" It is true that in Cowper vs. Godmond the election to disaffirm was with the party to whom the payment was originally made, but this does not effect the principle on which the right to recover rests. The object is to get back a consideration, which has failed, and in such cases it is evident there can be no cause of action until the failure is complete. In Cowper vs. Godmond the payment was for

the annuity, and the failure did not occur until the grantor of the annuity disaffirmed his grant. Here the consideration was paid to get a credit with the United States, and the failure was not complete until the credit which had once been given was withdrawn.

"This disposes of the case, as it is conceded the action was begun within three years after the United States gave notice of its election to withdraw the credit. The liability of the First National to account for the amount erroneously credited was established by the judgment in favor of the United States, and, as the Merchants' National was notified of the pendency of that suit and took part in the defence, it must abide by the result."

The gist of the decision is in the position that, by the endorsement of the check, the endorsing bank warranted not only the genuineness of the endorsement, but that the maker of the check should never question the endorsement; in other words, that the charge by the depositary bank to the maker, of the amount of the check, should never be disaffirmed by him.

If the position is correct, a great number of cases which hold that the forgery of the endorsement constitutes an immediate breach of the warranty of its genuineness, have been erroneously decided.

Vide United States Bank vs. Daniel, 12 Pet, 32, 56.
Wilcox vs. Plumber, 4 Pet., 172.
English and other cases, *supra.*

Of the continuing liability of a depository bank to its depositor there is no question. That proceeds from the nature of the relation between the parties. The obligation of the depository bank is to *hold* the funds of its depositor and to pay them *upon his demand.* Until he or some person authorized by him has withdrawn the deposit, it remains with the depository bank, and may, after proper demand, be sued for at however great an interval. The longer the interval, the better for the depository bank. During the intervening period it has the use of the deposit. This furnishes adequate consideration both for its engagement to pay its depositor upon demand, and to assume the risks of the business, one of which is the possibility of accepting a forged endorsement. From that possibility the depositary bank can protect itself.

The relation between a depositary bank and a stranger who presents a check drawn by a depositor for payment is entirely different. If his title to the check is good, that is the end of the business between him and the bank. It is the whole of the transaction between the two. The limit of his liability is in the fact that by pre-

senting the check he declares that the endorsements are genuine and that by endorsing the check himself, if he does so, he warrants the genuineness. If the endorsement is forged, the money received by him has been obtained under a mutual mistake of fact and in reliance upon his warranty. Looked at from either point, there is an immediate right to a return of the money. This has been settled law as far back as

Bree vs. Holbeck, 2 Doug., 654.

5. If to make perfect the right of action of the Merchants Bank for breach of warranty required it, the case showed that that bank had yielded up its possession to a title paramount to its own, *i. e.*, to the British Bank. It does not matter whether this is done voluntarily or involuntarily.

Bordwell vs. Collie, 45 N. Y., 494.
Case vs. Hall, 24 Wend, 102.
Sweetman vs. Bunce, 26 N. Y., 224.
Burt vs. Dewey, 40 N. Y., 283.
McGiffin vs. Baird, 62 N. Y., 329.
Converse vs. Minor, 21 Hun, 367.

The check was intended by the British Bank to go to Mrs. Halpine. It never reached her. Until it did it did not constitute payment to her of the amount due her from the bank, and she was not entitled to its possession.

The Merchants Bank did in due course surrender the check to the British Bank. If it had not done so, it had no right to withhold the check from the bank.

To complete its cause of action against the Leather Bank did not require that it should violate its duty to the British Bank by wrongfully retaining the check, so as to tender it to the Leather Bank and thus perfect its cause of action against that bank for its breach of warranty.

Bordwell vs. Collie, 45 N. Y., 494.

" To hold that the purchaser of personal property must become a wrongdoer by withholding it from the true owner, and compel him to resort to an action for its recovery to entitle him to redress for a breach of warranty of title would be absurd."

Vide Randon vs. Foley, 11 How. U. S., 493, 521.

Second.

The failure by the Merchants' Bank before the commencement of the suit to tender the check to the Leather Bank and to demand payment, precluded a recovery on any theory of the case upon which it can be held that the claim was not barred by the Statute of Limitations.

1. If the responsibility of the Leather Bank is analogous to that of a depositor with the Merchants Bank, obviously tender and a demand were necessary. The obligation of a depositary bank is to pay upon demand. Until a proper demand has been refused it is not in default.

2. If the view of the transaction taken by the Merchants Bank in its complaint be the correct one, *i. e.*, money paid by mutual mistake, demand and tender were a prerequisite to bringing suit.

Southwick vs. First National Bank, 84 N. Y., 420, 430 :

BY THE COURT : " Whether the action be treated as one for the con-
" version of the draft or of the money paid thereon, *or for the re-*
" *covery of money paid by mistake, a demand was a prerequisite* to the
" maintenance of the action against the defendant, who lawfully and
" innocently received the draft and the money paid thereon. *The*
" *obligation of a party to refund money voluntarily paid by mistake*
" *can arise only after the notification of the mistake and a demand of*
" *payment* (citing cases). It matters not that it is quite probable
" that the defendant would not have complied with the demand, if
" one had been made, for that does not dispense with the necessity
" of making it, * * * nor does it matter that the defendant has
" upon the trial contested the plaintiff's right to recover. *That* has
" occurred *since the commencement of the action* and the plaintiff's
" right of action *must have been perfect when the suit was com-*
" *menced.*"

Sholey vs. Halsey, 72 N. Y., 578, 582.
Stephens vs. Board of Education, 3 Hun, 712.
Abbott vs. Draper, 4 Den., 51.

3. What passed between the officers of the two banks did not constitute a tender and demand.

(*a*) The position of the Merchants Bank at that time was that the endorsement of Mrs. Halpine was genuine. It was not until the decision of the Court of Appeals in the suit by the British Bank

against the Merchants Bank years afterwards that the latter yielded this point.

(*b*) To make a valid tender the check must have become the property of the Merchants' Bank. It never did. It certainly never became the property of that bank until it paid the British Bank. This was years later. Until then the Leather Bank could not pay. If it had paid the Merchants Bank and the latter had omitted to pay the British Bank, it could have sued the Leather Bank for a conversion of the check. It would have been no defense for that bank to plead that it had paid the Merchants Bank.

(*c*) The check was left with the Merchants Bank "to look into it." A tender by the Merchants Bank would not only have been unauthorized, it would have been in violation of the right of the British Bank. If the Leather Bank had accepted the tender, the British Bank could for that reason have reclaimed the check.

Third.

The objection that the action was prematurely brought is a practical objection. On March 15th, 1883, the Merchants Bank did in writing tender the check to the Leather Bank and demand payment. That was five and a half years after the commencement of the suit.

If a demand and tender was necessary, interest would not run until after default. Interest at the rate of seven per cent. and six per cent. as allowed by the Court, amounted to over one thousand dollars a year. The decision of Judge WALLACE requires the Leather Bank to pay that interest for five and a half years, while the check was not in the possession of the Merchants Bank and could not be surrendered by it to the Leather Bank; during a period, in fact, when the position of the Merchants Bank was inconsistent with its having a claim against the Leather Bank. During all that time it insisted that the endorsement was genuine.

It would be unreasonable for the Merchants Bank to recover interest during a delay caused by its refusal to recognize the liability which the Court enforced against it. In no view of the transaction was there a right to the recovery of interest. Even if it were a ques-

tion of misfortune only, there is no reason why to that extent the Merchants Bank shall not share the misfortune of the Leather Bank.

Grymes vs. Sanders, 93 U. S., 55, 61, 62:

BY THE COURT: "The appellants sat quietly in the dark until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it (citing cases).

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted.

* * * * * * * * *

A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this cannot be done it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees and cannot conveniently restore it."

Last.

The right of the Merchants Bank was or was not complete at the beginning.

If it were complete, the Statute of Limitations has barred the claim. If it were not complete, tender and demand were necessary to perfect it. In either case it was error to direct a verdict for the Merchants Bank.

The judgment should be reversed with costs to the plaintiff in error.

JOHN E. PARSONS,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

THOMAS C. CHAPPELL,
Plaintiff in Error,

vs.

JOHN B. BRADSHAW,
Defendant in Error.

MOTIONS—1. To Dismiss.
2. To Affirm, with Damages.
BRIEF IN SUPPORT OF MOTIONS, AND EXHIBIT.

B. HOWARD HAMAN,
WM. A. HAMMOND,
Attorneys for Bradshaw.

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B. Howard Haman,
Wm. A. Hammond,
Attorneys for Bradshaw.

Burgoyne Quick Printing Co., cor. Centre and Walker, N. Y

Supreme Court U.S.
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CLERK.

Supreme Court of the United States.

THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant in Error,

ADS.

THE LEATHER MANUFACTURERS' NATIONAL BANK,
Plaintiff in Error.

In Error to the United States Circuit Court for the Southern District of New York.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This action was commenced by the Merchants' Bank against the Leather Bank to recover the amount of a check paid by the former to the latter under the following facts which were, by stipulation between the counsel on the trial, admitted to be true (Record, p. 15). The check, a copy of which is set forth in the Record (page 15) is dated March 9, 1870, and drawn by the agents of the Bank of British North America, herein called the British Bank, on the Merchants' Bank, payable to the order of Margaret G. Halpine or order for $17,500 in current funds.

This check was on the 9th of March, 1870, delivered by the drawer to William Thomas Thompson and William M. Ramsey (Record, p. 15), and was accepted by the drawee. When said check was drawn the British Bank had on deposit with the Merchants' Bank funds wherewith to pay the check.

On the 10th day of March, 1870, the check was presented to the drawee by the plaintiff in error for payment and was paid, and then bore the endorsements appearing on the copy of the check.

On March 10, 1870, the check, being paid, was charged by the Merchants' Bank on its own books against the British Bank in its account.

On the 17th of March, 1870, in accordance with the course of dealing between the two banks, the pass-book containing the charge and the account was balanced and returned to the Bank of British North America, together with said check as a voucher for said charge. The account between the British Bank and the Merchants' Bank continued at all times since the 9th of March, 1870, down to the time of the trial (Record, pp. 15–16).

On January 24, 1877, the British Bank for the first time learned that the signature of the payee of said check thereon endorsed was questioned or disputed, and that it was claimed that the same was not genuine.

On January 26, 1877, the British Bank gave the Merchants' Bank written notice of that date to that effect (Record, page 16).

On August 10, 1877, the British Bank gave the Merchants' Bank another notice of that date (see Record, page 16), stating that a suit had been brought against the British Bank by the parties to whom the check had been delivered by the drawers on the ground that the endorsement of the payee was forged.

On June 20, 1877, the British Bank for the first time demanded from the Merchants' Bank repayment of the amount of said check, so charged against it in said account between the two banks, and

tendered the check, and the Merchants' Bank refused to pay it.

On or about November 7, 1877, the British Bank commenced an action against the Merchants' Bank to recover said amount and interest, on the ground that the endorsement of the payee was forged. For the nature of the action and defenses (see Record, p. 12). It was admitted in the language of the answer, Record, p. 7, "that the plaintiff (Merchants' Bank) notified it (Leather Bank) of the commencement of such action and that before the trial it gave a further notice of the pendency of such action."

On or about December 7, 1877, the Merchants' Bank commenced this action againt the Leather Manufacturers' National Bank, and on December 8, 1877, gave the notice of that date set forth in the Record, p. 13, referring to the action of the BritishBank, and also gave to the Leather Bank the notices of May 26, 1879, and September 30, 1880, set forth on pages 14 and 15 of the Record.

On March 7, 1881, the British Bank recovered a judgment against the Merchants' Bank for the amount of the check so charged and interest from July 20, 1877, which was the date fixed by the pleadings in that action for the demand made by the British Bank, and costs. Said judgment was subsequently affirmed by the Court of Appeals, 91 N. Y., 108.

On or about the 25th of January, 1883, the Merchants' Bank paid said judgment, and on the 15th of March, 1883, notified the Leather Manufacturers' National Bank thereof, and tendered the check (see Record, p. 17).

Said judgment was recovered on the ground that the endorsement of the payee was forged (Record, p. 12), and the fact that it was in fact forged by the second endorser was admitted on the trial of this cause (Record, pp. 16–20).

In June, 1877, when the attorney for the British Bank

made a demand on the Merchants' Bank for repayment he left the check with the cashier of the Merchants' Bank (Record, p. 11), who immediately presented it to the cashier of the Leather Bank, and stated to the latter that the Merchants' Bank had been called on to refund the money, and that the latter therefore made the same demand on the Leather Bank. The latter bank declined to have anything to do with the matter, and the cashier of the Merchants' thereupon returned the check to the British Bank, who retained it until the judgment against the Merchants' was paid as aforesaid, when it was given to the latter as before stated.

At the close of the testimony plaintiff in error moved the Court to direct the jury to find a verdict for it, which motion was denied and the ruling excepted to. The Court thereupon directed a verdict for the defendant in error for $17,500 and interest from June 20, 1877, which was the date from which the British Bank recovered interest against the Merchants' Bank.

The record raises only two exceptions :

1st. That the cause of action, if complete, did not accrue within six years before the commencement of the suit.

2d. That the cause of action, if a demand and tender were necessary, had not accrued when the action was commenced (Record, p. 9).

The nature of the action against the Merchants' Bank and the defenses interposed are stated in the Record, p. 12 ; and the case of Thompson against The Bank of British North America is reported in 82 N. Y., 1, and that of The Bank of British North America against the Merchants' National Bank in 91 N. Y., 108.

The provisions of the Code of Civil Procedure in New York, §§ 380–382, are that "an action upon a contract, obligation or liability, express or implied, except a judgment or sealed instrument, must be commenced within 6 years after the cause of action has accrued."

POINTS.

First. The cause of action in favor of the defendant in error did not accrue until June, 1877, when the British Bank for the first time objected to being charged with the amount of the check. The action was commenced December 7, 1877. The answer admits that the British Bank did not object to be charged with the check at the time it was made (Record p. 7, Subd. 2), and it was admitted on the trial that the check was charged 10 March, 1870, and returned to British Bank 17 March, 1870, and that the first notification was given to the Merchants' Bank in June, 1877 (see Record, p. 15–16).

The precise point was decided in Merchants' National Bank, plaintiff in error, against the First National Bank of Baltimore, defendant in error, in U. S. Circuit Court (Op. WAITE, C. J.), reported in 3 Fed. Rep., p. 66. In which latter report the syllabus of the case is as follows: "In a suit "by the drawee of a bill of exchange against an "endorser, where such bill was drawn by the "Treasurer of the United States, and the name "of the payee forged, the Statute of Limita-"tions does not begin to run until judgment has "been obtained by the United States against "the drawee."

U. S. vs. Bank, 6 Fed. Rep., 852.
Cooper vs. Godmond, 9 Bing., 748.
S. C., 23, E. C. L. R., 453.
Churchill vs. Bertrand, 2 Gale & Davison, 551.
Ripley vs. Withee, 27 Texas, 14.

As was well said in one of the cases, the cause of action arose when the defendant held the money for the use of the plaintiff, and this it

did not do when the money was paid, but when it became wrong for the defendant to withhold it, and this was when the mistake was ascertained and communicated to the defendant, and it was called upon to refund.

Second. It is clear from the undisputed evidence that the money was paid by the Merchants' Bank to the Leather Bank under a mistake of fact as to the genuineness of the endorsement of the check by the payee.

The principle is well established by the highest Court of the State of New York that an action to recover back money paid under a mistake of fact cannot be maintained until notice of the mistake has been given and a demand for repayment of the money made.

Southwick vs. Bank, 84 N. Y., 430.
Sharkey vs. Mansfield, 90 *Ib.*, 229.
Stephens vs. Board, 3 Hun., 715.
U. S. vs. Bank, 6 Fed. R., 852.
Freeman vs. Jeffries, 4 L. R. Exch., 189.
Marine Bk. vs. City Bk., 59 N. Y., 67.

It is well settled by the highest courts in New York that where demand is an essential ingredient of the cause of action the action does not accrue and the Statute of Limitations does not begin to run until the demand made.

This was decided in the case between the Merchants' Bank and the British Bank where the Court overruled the defense of the statute, and held that the statute did not begin to run until after the discovery of the mistake and notice thereof and demand.

Bank vs. Bank, 91 N. Y., 108.
Gauley vs. Bank, 98 *Ib.*, 495.

In the latter case the Court say: "It is universally true that the Statute of Limitations "does not commence to run upon a cause of "action upon contract until it has accrued, and "that when a demand is necessary before an "action can be commenced the statute does not "begin to run until after the demand. * * * "In this case the contract was not completely "broken until the demand."

The same principle was established in Smiley vs. Fry, 100 N. Y., 263.

Third. The cases which hold that a transferee of securities is not bound to notify the transferer of a lack of genuineness of the securities or of the the title thereto until the lapse of a reasonable time after the discovery of the fact, and that until such discovery he owes no duty to the transferer, have an important bearing on the questions in this case.

U. S. vs. Bank, 6 Fed. Rep., 856.
Frank vs. Lanier, 91 N. Y., 116. Op. DANFORTH.
Heiser vs. Hatch, 86 *Ib.*, 614.
Canal Bank vs. Bank, 1 Hill (N. Y.), 291.

So also do the cases which held that the Leather Bank owed no duty to the plaintiff in error to examine and ascertain whether the endorsement was genuine before the check was paid.

Corn Bank vs. Nassau Bank, 91 N. Y., 74.
Crawford vs. Westside Bk., 100 *Ib.*, 51.
White vs. Bank, 64 *Ib.*, 320.
Holt vs. Ness, 54 *Ib.*, 475.
2 Dan. Neg. Inst., 1663.
Marine Bk. vs. City Bk., 59 N. Y., 67.

And the cases which held that negligence in making a payment is no defense to an action to recover back money paid under a mistake of fact, especially where both parties were equally bound to inquire.

Kingston Bk. vs. Etting, 40 N. Y., 391.
Mayer vs. Mayor, 63 *Ib.*, 455.

Fourth. The decision of the Court of Appeals in rendering the judgment in favor of The British Bank agt. The Deft. in Error, reported in 91 N. Y., 106, settled the question in controversy here against the plaintiff in error, and notice of the institution of that action having been given to it, the judgment recovered in that action is conclusive as to the right of the Merchants' Bank to recover in this action.

Record, pp. 8, 13, 14.
Robbins vs. Chicago, 4 Wall., 657.
Chicago vs. Robbins, 2 Black, 418.
Heiser vs. Hatch, 86 N. Y., 614.

Fifth. It was not necessary that the Merchants' Bank, to entitle it to maintain the action, should have actually paid the money to the British Bank because the action is not brought to recover the money paid to the British Bank, but is brought to recover the money which it paid to the Leather Bank, and its right to recover this was complete, when it had within a reasonable time after the discovery notified the Leather Bank of the mistake and demanded repayment of the money (see cases under first and third points).

Nor was it necessary to entitle the plaintiffs to maintain the action that it should have acquired the title to the check by repayment and should have tendered the check before action commenced.

A tender of the check was not necessary as an ingredient of the cause of action (U. S. vs. Bank, 6 Fed. R., 855), because the action was not based on the check, nor was the possession of the check necessary to enable the Merchants' Bank to maintain the action, nor to enable the Leather Bank to recover against those to whom it had paid. Notice of the mistake and demand were all which were necessary to constitute the cause of action. The plaintiff in error could have given notice and made demand when notice was given to and demand made upon it. It could also have given notice of the action against it, so as to make the judgment thereon binding on the parties with whom it dealt. For its failure to discover the forgery at the time it received the check, the Leather Bank was responsible, and not the defendant in error (see Cases under Third Point).

Had the defendant been willing to pay and refused on the ground that the check was not tendered, the case might be different, as in that case the defendant in error could have paid the money and acquired the title to the check, but the refusal was absolute and not put on that ground, and a tender was thereby waied. Defendant could not compel the plaintiff to pay the amount of the check so as to acquire the actual ownership of it for the purpose of going through the useless formality of tendering it to defendant. But if a tender were necessary, then we submit,